80-1150

NO. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIS L. SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Whether or not the trial court erred in failing to charge the jury on the defense of alibi, when the defense made no request therefor, and when the defense tendered no evidence supporting an alibi?

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The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Georgia Court of Appeals' decision in this case. This opinion is reported as Smith v. State, 155 Ga. App. 506, ___S.E.2d___ (1980).

STATEMENT OF THE CASE

Alvis L. Smith, Jr., hereinafter referred to as Petitioner, was indicted, tried, and convicted for the offense of rape in Catoosa County, Georgia. The evidence at trial consisted primarily of the testimony of the victim, Donna Lorane Woodall; the physician who examined her, Dr. Elizabeth Walker; and two law enforcement officers assigned to investigate the case, Walter Smartt and Charles Black.

The uncontroverted record showed that the victim was kidnapped at gunpoint on December 22, 1975, by the Petitioner. Petitioner drove the victim from Chattanooga, Tennessee to Catoosa County, Georgia where he raped her and left her stranded on the side of a road. (T. 7-17). The Petitioner was positively identified in the courtroom and at a previous police lineup as the rapist. (T. 11, 37).

An examination by a doctor revealed that the victim had an abrasion on the entry of her vagina,and based on her expert opinion the sexual intercourse had been forced. (T. 117-121).

During the trial, the State introduced two inconsistent statements made by Petitioner to two different law officers. Petitioner told F.B.I. Agent Smartt that he met the victim on three occasions in Chattanooga. (T. 98-101). Petitioner also told Catoosa County Deputy Sheriff Black that he had been with the victim on three occasions, but the location and times of these meetings were substantially different from his statements to Smartt. He did state, however, that he had never been to Georgia with the victim. (T. 108). Petitioner did not put forward any evidence on his own behalf, (T. 122), and at no time during the trial did he account for his whereabouts on December 22, 1975.

At no time during the trial was sworn testimony tendered as to the potential impossibility of the Petitioner's presence at the scene of the offense at the time of its commission. Most importantly, at no time during the trial did the Petitioner raise the defense or request that the court instruct the jury on the defense of alibi.

The Georgia Court of Appeals held that the court is to charge the jury on the defense of alibi, even without request, only in circumstances "where alibi is the sole defense and where there is some evidence to support it." Smith v. Georgia, 155 Ga. App. 506, ___S.E.2d___ (1980). Accordingly, the Court of Appeals denied the appeal and affirmed the conviction, because the Petitioner did not raise any evidence supporting an alibi, and because he did not raise the issue of an alibi during the trial.

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN FAILING TO CHARGE THE DEFENSE OF ALIBI WHEN THE DEFENSE MADE NO REQUEST THEREFOR, AND WHEN THE DEFENSE TENDERED NO EVIDENCE SUPPORTING AN ALIBI.

(A) THE COURT IS ONLY OBLIGATED TO CHARGE THE DEFENSE OF ALIBI WHEN IT IS THE PETITIONER'S SOLE DEFENSE, OR WHEN HE REQUESTS IT.

The court's duty to charge on the defense of alibi was set out most recently in Henderson v. State, 148 Ga. App. 659, 252 S.E.2d 83 (1979). The Court of Appeals noted that "both this court and the Supreme Court (of Georgia) have consistently held

that where alibi is the sole defense of the accused, the failure of the trial court to charge on the defense of alibi, even in the absence of a request, is a reversible error where there is some evidence to support it." Id. at p. 661.

The thrust of the Petitioner's application for a writ of certiorari is that the afore-cited rule mandates court instruction on the defense of alibi, because the Petitioner's statements to the investigating officers were unequivocal in their meaning that Petitioner had never been with the victim in Catoosa County, Georgia, the scene of the crime charged against him.

Careful examination of the rule in Henderson, supra, reveals that the court is obligated to charge only when alibi "is the sole (emphasis added) defense of the accused . . . " Id. at p. 661. Although

sworn testimony of the accused, in and of itself, may be sufficient to raise the defense of alibi, such a situation is not before the Court. Instead, Petitioner relies on two conflicting statements which were not made under oath, and which did not establish his whereabouts on the date of the crime.

In summation, the courts in this State have indicated, either expressly or by necessary implication, that as a threshold consideration, the evidence must support the alibi defense, and when it does so, an instruction, even though not requested, is ordinarily required. In the case at bar, the trial court was not obligated to give an unrequested alibi instruction to the jury because no evidence was tendered that raised a "reasonable doubt" as to the impossibility of Petitioner's presence at the scene of the crime.

(B) PETITIONER'S OUT OF COURT, INCONSISTENT, UNSWORN STATEMENTS ARE INSUFFICIENT TO RAISE A DUTY TO CHARGE ON ALIBI.

The Petitioner contends that his out of court unsworn statements, as testified to by the two investigating officers, were sufficient to raise the defense and necessitate the charge of alibi. The pertinent state statute on alibi as a defense, directs that it,

> ". . . involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as to exclude the possibility of presence." Ga. Code Ann. § 38-122.

In interpreting this statute the Supreme Court of Georgia in Hunt v. State, 229 Ga. 869, 195 S.E.2d 31 (1972), faced a similar issue to that in this case, and stated:

> "It is not error to fail to charge on alibi when there is no request therefor and the only basis for alibi consists of a defendant's unsworn statement." Id., at p. 870; accord, Wynes v. State, 182 Ga. 434, 436, 185 S.E. 711 (1936); Bagley v. State, 212 Ga. 206, 207, 91 S.E.2d 506 (1956); Bryant v. State, 229 Ga. 60, 62, 189 S.E.2d 435 (1972).

Furthermore, before a charge on the defense of alibi will be required, "the range of the evidence with respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence." Colbert v. State, 149 Ga. App. 266, 268, 353 S.E.2d 885 (1979). In the case at bar, on the other hand, "the evidence relating to alibi is not clear and of strong probative value, [and] the failure to charge thereon, in the absence of a proper request, should not be cause for a reversal." Callahan v. State, 147 Ga. App. 301 (1978).

As detailed in the statement of the case, the Petitioner did not tender any evidence as to his whereabouts on the date of the rape. Moreover, Petitioner's two conflicting statements to the law enforcement officers were indicative of his inability to give the officers a clear statement of his activities when he was with the victim. Thus, under the Callahan, supra, rationale, the trial court was not required to charge, sua sponte, on alibi.

Petitioner claims that the rule in Henderson supra, requires an instruction on alibi any time there is "some" evidence, even if the only evidence was the defendant's uncorroborated, unsworn, out of court statement. Nevertheless, in this case, there was no evidence of Petitioner activities on the night Ms. Woodall was raped, other than the evidence which proved him to be the assailant. As noted earlier, this included a positive identification by the victim.

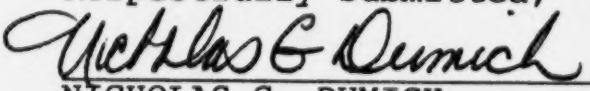
As in Georgia, the federal courts likewise do not require an instruction on the defense of alibi, absent a request, if the evidence and circumstances do not warrant one. See, e.g., United States v. Stirone, 311 F.2d 277, 281 (3rd Cir. 1962), cert. den., 372 U.S. 935, rehng. den., 372 U.S. 981 (1962); United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975), cert. den., 425 U.S. 905 (1976).

Accordingly, this Court should decline to grant the writ of certiorari in this case.

CONCLUSION

For all the above and foregoing reasons, it is respectfully requested that the petition for a writ of certiorari in the present case be denied.

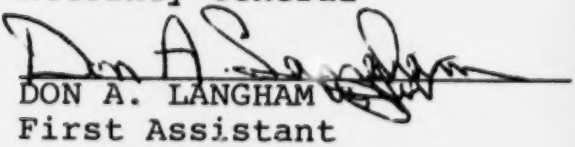
Respectfully submitted,



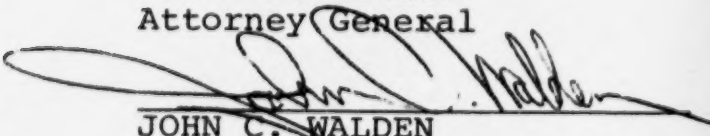
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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, a member of the Bar of this Court, and Attorney of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioner, by depositing same in the United States mail, with adequate postage thereon and addressed to:

Mr. Jon Bolling Wood
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This 15th day of January, 1981.

/S/
NICHOLAS G. DUMICH